Supreme Court, U.S.
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No._____

In the

Supreme Court of the United States

Ray Milton Pennington, III
Petitioner

v.

Town of Front Royal, Virginia

On Petition for Writ of Certiorari
To the Court of Appeals of Virginia

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

QUESTION 1.

In a Virginia jury trial (bifurcated) alleging a third offense of Driving Under the Influence of Alcohol, the admission into evidence in the guilt or innocence stage of the trial of Appellant's prior convictions for Driving Under the Influence unduly and unnecessarily prejudices the jury against the Appellant, and violates the Appellant's rights to Due Process under the Fifth and Fourteenth Amendments of the U.S. Constitution, and his rights to a trial by a fair and impartial jury under the Sixth Amendment of the U.S. Constitution.

QUESTION 2.

The evidence of the prosecution was so internally and fatally conflicting, in that the evidence of two of the three witnesses of the prosecution was susceptible of an interpretation consistent with the innocence of, and the evidence of, the Appellant, and the prosecution evidence was so tainted by the knowledge of the jury of Appellant's prior convictions (inextricably connected to Question No. 1, above), that reasonable doubt of Appellant's guilt was necessarily present, and there was insufficient evidence to convict the Appellant. As a result, Appellant's right to Due Process of the Law under the Fifth and Fourteenth Amendments of the U.S. Constitution, and his right to a trial by a fair and impartial jury under the Sixth Amendment of the U.S. Constitution have been violated.

QUESTION 3.

The Supreme Court of Virginia refused to remand the case back to the trial court for a hearing on the

following allegations not learned until the matter was before the appellate court: (i) that the foreman of the trial jury was a convicted felon (felons are incompetent to serve on juries under Virginia law); (ii) that the same juror bore, and had stated, previous animus toward the Appellant; and (iii) that the same juror had stated that a major part of the deliberations of the jury as to Appellant's guilt or innocence centered around Appellant's prior convictions. This refusal to remand or dismiss violated Appellant's rights to a trial by a fair and impartial jury under the Sixth Amendment of the U.S. Constitution, and to Due Process under the Fifth and Fourteenth Amendments of the U.S. Constitution.

PARTIES TO THE PROCEEDING are shown on the cover page, except for service on The Attorney General of the Commonwealth of Virginia pursuant to Rule 29.4 (b)

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TABLE OF CITED AUTHORITIES

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COMMONWEALTH OF VIRGINIA STATUTORY AUTHORITY

Code of Virginia, 1950, as amended.

18.2-266 2,4,16,17,18,20
18.2-270 2,4,17,18,19
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CITATIONS OF THE OPINIONS OR ORDERS ENTERED IN THIS CASE:

1. Unpublished Order and opinion of the Court of Appeals of Virginia affirming conviction (February 29, 2000): Appendix A

2. Unpublished letter opinion of the trial court (June 5, 1998): Appendix B

3. Unpublished *Nunc Pro Tunc* Sentencing Order of the trial court (January 4, 1999): Appendix C

4. Unpublished refusal of Petition for Appeal to Supreme Court of Virginia (September 7, 2000): Appendix D

5. Unpublished Order of Supreme Court of Virginia denying prayer for rehearing, and dismissing motion for Remand (December 14, 2000): Appendix E

JURISDICTION

The jurisdiction to hear this appeal is based on 28 U.S.C. 1257(a)

A timely order for rehearing the case was filed in the Supreme Court of Virginia on September 20, 2000; a Motion to Remand was filed in October 2000, and both were denied on December 14, 2000.

Under Rule 10 (b) and (c) of the Rules of the U.S. Supreme Court, a writ of certiorari may be issued when a state court of last resort has decided an important federal question that either should be settled by this court, or has decided an important federal question that conflicts with

relevant decisions of this court or the U.S. Court of Appeals.

It is possible that the constitutionality of Section 18.2-266, Section 18.2-270, and 8.01 352 of the Code of Virginia 1950, as amended, may be called into question. Therefore, this Petition for Writ of Certiorari is being served on the Attorney General for the Commonwealth of Virginia.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE

The Constitution of the United States of America
Fifth Amendment

Rights of Accused in Criminal Proceedings. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Constitution of the United States of America
Sixth Amendment

Right to Speedy Trial, Witnesses, etc. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed,

which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

The Constitution of the United States of America
Fourteenth Amendment

Section 1. Citizenship Rights Not to Be Abridged by States. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The relevant portions of the Virginia statutory authorities are set forth in Appendix F.

STATEMENT OF THE CASE

For reference, Court of Appeals Appendix citations for particular statements of witnesses, the judge, or counsel have been provided; should this Petition be granted, the Court of Appeals Appendix will be provided; the single word "Appendix" applies to the Appendix to this Petition..

THE TRIAL:

The Appellant was tried in the Warren County Circuit Court, Front Royal, Virginia on February 24, 1998, before a jury, on a charge of Driving Under the Influence

of Alcohol, third offense within ten years. The relevant Virginia statutes are 18.2-266 (driving under the influence) and 18.2-270 (penalties for violations, whether first offense or subsequent). The Appellant was represented by counsel, as was the Town of Front Royal, which was prosecuting him.

At the commencement of the trial, counsel and the trial judge discussed the introduction of evidence of Appellant's two prior convictions of driving under the influence (hereinafter, "DUI") in the guilt or innocence stage of the trial, redacting the evidence of the punishment given in the previous convictions.[Court of Appeals Appendix, p. 183] [It having been clearly decided by the Virginia Court of Appeals in *Farmer v. Commonwealth*, 10 Va. App. 175, 390 S.E.2d 775 (1990), aff. 12 Va. App. 337, 404 S.E.2d 371 (1991), and later reaffirmed in *Berry v. Commonwealth*, 22 Va. App. 209, 468 S.E.2d 685 (1996), that evidence of prior convictions should be introduced in the guilt or innocence stage of DUI trials charging a subsequent offense, no objection by defense counsel to the introduction of such evidence was made.]

Relative to Question 3, alleging the presence of a disqualified and biased juror, and the consideration by the jury of improper information, there were several questions and statements made by counsel and the judge during voir dire that are relevant to the Petition.

When asked if anyone on the panel knew the Appellant, only one person answered affirmatively and he was dismissed. When asked if there was any bias or prejudice on the part of any prospective juror, no one responded, and the same was true when the court asked if any juror could not act fairly and impartially, based solely on the evidence and the law. The jury was asked

by the court during voir dire if they could comply with an instruction not to consider the fact of prior convictions of the Appellant as evidence of his guilt, and no juror responded. [See Court of Appeals Appendix, pp. 193, 198, 199, and 204-206]

Officer Robinson, the police officer who charged the Appellant, testified to the following;

- He was at the Texas Spirit Saloon (also known as the "Grapevine") on October 7, 1997 at approximately 2:14 a.m. to check windows and doors.
- He saw a pickup truck drive down Royal Avenue adjacent to the Saloon, turn onto Commerce Avenue, and then turn into the Saloon parking lot.
- He saw the vehicle proceed slowly across the parking lot toward him, and then as it turned, with the headlights in his eyes, he "heard" the vehicle strike a "support" on the building.
- The vehicle proceeded to the rear of the of the lot, and came to rest, and the lights and engine were turned off, while he was standing near his police cruiser.
- He approached the vehicle within twenty to thirty seconds, not seeing anyone exit the vehicle.
- See Court of Appeals Appendix, p. 242., for above.
- He did not see any other vehicle leave the parking lot, nor hear one start up, there was no other traffic, and the lights in the lot were out. A business known as Coldwell Banker has a parking lot adjacent to the Saloon lot. [Court of Appeals Appendix, p.243]
- Shortly after he heard the vehicle strike the support, he saw a light come on in the second floor of the Saloon, he shined a flashlight up to the window, saw two figures, and asked them, "Did you hear that?" [Court of Appeals Appendix,

p. 263, 277]

- When he approached the vehicle, he found the Appellant sitting in the vehicle alone, with the engine and lights off, and obviously quite intoxicated. (There is no issue in this appeal as to whether the Appellant was intoxicated)
- While he was administering sobriety tests, one of the other prosecution witnesses came out to the vehicle [Court of Appeals Appendix, p. 251-252], (which location and time frame was disputed by both the other prosecution witnesses, Kensy and Bird. [Court of Appeals Appendix, pp. 283, 289, 307])
- The officer did not ask the Appellant if he had been driving the vehicle [Court of Appeals Appendix, p. 267], and the Appellant did deny that he had hit anything. [Court of Appeals Appendix, p. 254, 267]
- He denied that he ever drew his gun. [Court of Appeals Appendix, p. 269]

The prosecution then called two other witnesses, Kensy and Bird, who lived in the apartment on the second floor above the Saloon. The following describes their testimony:

- Both Kensy and Bird disputed the time frame for the officer to get to the Appellant's vehicle, and the location of the police officer when they approached him.
- Kensy said he heard a loud noise, looked out, and then put on his shoes and went downstairs to investigate, taking about two minutes to get to the parking lot. [Court of Appeals Appendix, p.283.
- When Kensy got to the lot, he saw the officer standing at the far side of his cruiser, shining his flashlight around the lot, about 50 to 60 feet from the Appellant's vehicle, and he believed that he

saw the officer's gun drawn. [Court of Appeals Appendix, p. 283, 289]

- Kensy said the officer told him that at the time the vehicle struck the building, he was behind the building, checking windows and doors, and that he came out after he heard the crash. He repeated this statement on further questioning, and stated that the officer did not approach Appellant's vehicle until Kensy got to the parking lot. [Court of Appeals Appendix, p. 290, 291]
- Bird testified that when he heard the noise and looked out the window, he saw the truck moving slowly and coming to a stop. [Court of Appeals Appendix, p. 299] On further examination, he said that he did not see the police cruiser when he first looked out the window, but that while he was making a 911 call, he saw the cruiser and hung up the phone. [Court of Appeals Appendix, p. 302]
- Bird said he asked the officer from the window what was going on, and the officer asked who he was. Bird had started the 911 call before he saw the officer, and when he saw the officer, he was standing near his cruiser. [Court of Appeals Appendix, p. 301-303]
- Bird said that when he and Kensy went downstairs, they saw the officer at his cruiser, that Bird then went around the building to see what made the noise, and that Kensy went around the other side of the building, before the officer went to the Appellant's vehicle, and that Bird then ran to the Saloon owner's house nearby to tell him that something had happened at the restaurant. [Court of Appeals Appendix, p. 307, 311]
- Bird also said the officer told him that when he heard the noise, he was on the "other side" of the restaurant. [Court of Appeals Appendix, p. 315]

All of the locations testified to by the prosecution

witnesses were marked on a sketch identified as Defense Exhibit 7, and were adopted by the prosecution and the defense. [Court of Appeals Appendix, p. 395] However, it appeared from the remembrances of the court and defense counsel that the jury never took Exhibit 7 into the jury room. [See the trial judge's letter opinion of June 5, 1998 (Appendix B)].

The prosecution rested, and defense counsel moved to strike the evidence as insufficient to establish that the Appellant was operating the vehicle, which was denied.

The defense presented three witness and the Appellant himself, and a description of that testimony follows:

- Mr. Hamrick, after being advised by the Court upon suggestion by the prosecutor that he could possibly be charged with "hit and run" {court of Appeals Appendix, p. 325] testified that he met the Appellant earlier in the evening, and they decided to ride together while the Appellant was drinking. They left Mr. Hamrick's car in the Coldwell Banker parking lot adjacent to the Saloon lot, and went to another establishment a few blocks away, in the Appellant's truck. [Court of Appeals Appendix, p. 344, 345]
- Appellant stayed at the "Mightyfine" restaurant for several hours, while Hamrick borrowed the vehicle and visited his girlfriend. [Court of Appeals Appendix, p. 346]
- At closing time at Mightyfine, Hamrick left with Appellant, and he drove Appellant's truck to the Saloon parking lot, with Appellant in the passenger seat. [Court of Appeals Appendix, p. 348]
- As he was in the parking lot of the Saloon, he

reached over to wake the Appellant and hit the step going into the Saloon. Hamrick saw a police car, but did not see an officer. [Court of Appeals Appendix, p. 350, 351, 361]

- He stayed in the vehicle for a few seconds, "maybe thirty seconds", and then left, got into his vehicle and drove away. [Court of Appeals Appendix, p. 352]

A Mr. Hartz, a friend of Appellant's, testified as follows:

- He was drinking with Appellant at the Mightyfine, and that they left at the same time at closing time. Hartz drove his vehicle, and Hamrick drove Appellant's vehicle; they drove down Royal Avenue and both made a left turn onto Commerce Avenue, and he followed them until Hamrick made a u-turn to go to the Saloon parking lot, whereupon he continued to his home. [Court of Appeals Appendix, p. 335-340]

Allison King, a bartender at the Mightyfine, then testified as follows:

- She served Appellant and Mr. Hartz until closing time, and when Appellant left she was worried about his ability to drive. Upon questioning Appellant, she was told that Hamrick was driving him.
- Hamrick only had one alcoholic drink, and she corroborated Hamrick's statement that he left to visit his girlfriend for a time.
- After she was assured that Hamrick was driving, Appellant, Hartz and Hamrick all left the establishment together, but that she did not go into the parking lot. [Court of Appeals Appendix, p. 326-329].
- She also confirmed on cross-examination that

Appellant and Hamrick arrived together. [Court of Appeals Appendix, p. 333]

Appellant's testimony as to where he was drinking, and who was driving, matched the testimony of the other witnesses. The remainder of his testimony follows:

- He had been talking to two girls in the Mightyfine, and he invited one of them to meet him at the Saloon.
- As he and Hamrick were traversing the parking lot at the Saloon, he heard a "bump", and then Hamrick pointed out a police car. Appellant said, "I know. There is no problem.", and Hamrick then left in his vehicle. [Court of Appeals Appendix, p. 371-373.]
- Appellant estimated that it was maybe a minute to a minute and a half until he saw lights coming around the building, and that minutes later the officer approached and asked for his registration, and asked if he had been drinking, to which he replied that he was not drinking at the time.
- The officer said he ran into the building, and he stated, "I did not run into the building."
- The officer never asked him if he was driving the vehicle. [Court of Appeals Appendix, p. 373-376]

The Defense counsel rested, and there was no rebuttal evidence. Defense counsel renewed his motion to strike, which was denied. [Court of Appeals Appendix, p. 388-389]

After argument by counsel, and the giving of instructions, including one that the jury should not consider Appellant's previous convictions as evidence that he committed the instant offense, the jury retired and came back with a guilty verdict. Defense counsel moved to set aside the verdict as contrary to the evidence, and the

judge set a time for filing of said motion and for argument.

In defense counsel's motion to set aside the verdict, he raised the issue of jury prejudice toward the Appellant as a result of the jury's knowledge that he had been twice previously convicted of DUI:

> "It is the opinion of this attorney that the two prior convictions which were entered into evidence in the Case in Chief, although not objected to at that time, were the basis for the Jury's verdict. Although there appears to be plenty of Case Law that says that those previous convictions are admissible in the Case in Chief in order to prove the Town's case, I submit that those two convictions in and of themselves were all that the Jury reviewed; and in fact, it my recollection after talking with the Defendant and other persons, that the Jury never even took the Exhibit, that being Defense Exhibit No. 7, into the Jury Room to review." [Court of Appeals Appendix, pages 33 and 34]
>
> "Therefore, for all of the factual reasons stated above, I believe that the Jury did not weigh any evidence as it is required to do, and simply failed to compare the inconsistencies in the testimony and the sworn oath of other witnesses stating that another party was operating the vehicle and decided to find the Defendant, Ray Milton Pennington, III, guilty because he had two prior convictions of driving while intoxicated, despite the Instruction and warning from the Court that those two

convictions could not be considered as evidence of this incident." [Court of Appeals Appendix, page 36]

The Trial Court denied Defendant's Motion To Set Aside The Verdict Or Award A New Trial in its letter opinion dated June 5, 1998. [Court of Appeals Appendix, page 81, 84] In doing so, the Trial Court did not address the precise question of jury prejudice, or the conflict between the evidence of the prosecution witnesses, as raised in the aforementioned Motion To Set Aside Verdict Or Award A New Trial, instead choosing to give great credence to the weighing of the evidence by the jury.

> "In doing so, they apparently chose to give great weight to the testimony of the police officer, and I do not find his testimony inherently incredible nor do I find the conflicts within the Commonwealth's case to be so substantial as to render the conviction improper." [Court of Appeals Appendix, page 84]

Defendant's new counsel made timely exceptions to the adverse rulings of the Trial Judge as shown in Defendant's Statements of Facts To Supplement Transcript, filed and accepted by the Trial Judge. Said Statement of Facts To Supplement Transcript was necessary as the ruling was made by letter opinion, and the hearing at which said opinion was presented was not transcribed. It should be noted that the Order setting forth the Trial Judge's ruling of June 5, 1998 was not entered until a *Nunc Pro Tunc* Order was signed by the Trial Judge on January 4, 1999 [Court of Appeals Appendix, page 80], without the opportunity for the Defendant's Counsel to endorse it before entry. However, the acceptance by the Court, without objection by the Town's counsel, of the

Statement of Facts to Supplement Transcript, show clearly that the exceptions were made at the unrecorded hearing where the court's ruling on its June 5, 1998 letter opinion were handed down.

Defendant's counsel raised the denial of due process issue in his Petition for Appeal timely filed in the Virginia Court of Appeals, in Question No. 3 (denial of due process as a result of knowledge by jury of prior convictions), and in his argument on Question No. 2 (insufficiency of evidence), alleging that the jury prejudice allowed the jury to convict on fatally conflicting prosecution evidence. Defendant's Counsel again raised the issue in its Petition for Appeal timely filed in the Virginia Supreme Court, in Assignment of Error No. 3 (denial of due process), and in Assignment of Error No. 2 (insufficiency of evidence), again alleging, on page 25 of the Petition for Appeal that the jury was prejudiced by its knowledge of Defendant's prior convictions.

Chief Judge Fitzpatrick of the Virginia Court of Appeals rendered the opinion denying Defendant's Appeal on all issues on February 29, 2000.

The Virginia Court of Appeals denied Appellant's appeal on the issue of denial of due process by virtue of prejudice on the part of the jury toward the Appellant caused by its knowledge of his prior convictions, but not on the merits of the argument. The Court of Appeals ruled that Appellant did not raise the issue at trial, but only in its post-trial motions, and that:

> "Because the objection was not timely made, Rule 5A:18 bars our consideration of this issue on appeal. Moreover, the record does not reflect any reason to invoke the good cause or ends of justice exception to Rule

5A:18." [Page 7 of the opinion]-

Appellant then filed a Petition for Rehearing before the Virginia Court of Appeals on March 13, 2000, and on April 27, 2000, the Virginia Court of Appeals refused to grant the Petition for Rehearing.

Appellant then filed a Petition for Appeal to the Virginia Supreme Court on May 26, 2000, which Petition was denied by the Virginia Supreme Court on September 7, 2000.

Appellant then filed a Petition for Rehearing before the Virginia Supreme Court on September 20, 2000, which Petition was denied by the Virginia Supreme Court on December 14, 2000.

THE JUROR IRREGULARITIES:

After the Virginia Court of Appeals affirmed Appellant's conviction, and after Appellant filed a Petition for Appeal to the Virginia Supreme Court, Appellant learned that the foreman of the jury, a David Catherman, was a convicted felon, in violation of Section 8.01-338 of the Code of Virginia. He further learned that the same juror had made statements to some other landowners, prior to Appellant's trial, which showed extreme animus toward the Appellant. It was learned by Appellant that this juror had stated that if Appellant came on his land, he would do great harm to him. Appellant, who is in the timber business, had been cutting timber near to where this future juror was living. Appellant also stated that he had a conversation with the juror after the matter was appealed to the Virginia Supreme Court, and the juror informed him that the matter of Appellant's prior convictions was a major part of the discussion in

determining Appellant's guilt or innocence.

Soon after learning these facts, Appellant's counsel requested counsel for the Town to confirm or deny that the juror was a convicted felon, and said fact was confirmed to Appellant's counsel by the new Town Attorney for the Town. Counsel for Appellant then filed a Motion For Remand or for Dismissal with the Supreme Court of Virginia in October, 2000, asking for a hearing to determine the facts, and to determine if the Appellant had suffered extreme prejudice as a result of the inclusion of said juror on the panel, which motion was denied by the Supreme Court of Virginia on December 14, 2000, in the same order which dismissed Appellant's Request for Rehearing.

REASONS FOR ALLOWANCE OF THE WRIT

The three Questions presented all represent examples of denial of fundamental constitutional rights to Appellant. There is no more important right guaranteed to a criminal defendant than the right to a trial by a fair and impartial jury, and each of the questions raise serious doubts as to the impartiality of the jury, or particular jurors, in Appellant's trial.

Question 1:

The Virginia appellate judicial holdings (*Farmer v. Commonwealth*, supra, and *Berry v. Commonwealth*, supra) that evidence of prior DUI convictions are elements of a crime of subsequent offense of DUI, and are therefore admissible in the guilt or innocence stage of a jury trial, are clearly at odds with the recent holdings of this court or the U.S. Court of Appeals for the Fourth Circuit in the following cases: *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), *Monge v. California*, 524 U.S. 721 (1998),

United States v. Fenner, 147 F.3d 360 (1998), *Jones v. United States*, 526 U.S. 227 (1999), *United States v. Davis*, 184 F.3d 366 (1999), *Castillo v. United States*, 530 U.S. _____ 99658 (2000), and *Apprendi v. New Jersey*, 530 U.S. ____99478 (2000). In the federal appellate cases above, it is clear that evidence of recidivism is a sentencing factor, and the prejudice suffered by a defendant if a jury has evidence of prior criminal activity before it decides guilt or innocence is a denial of fundamental fairness to that defendant and a violation of his Fifth, Sixth and Fourteenth Amendment protections.

Appellant has cited *Almendarez-Torres*, and later cases of this Court, as authority for its position on this issue. It must be pointed out that the *Almendarez-Torres* opinion was released by this Court on March 24, 1998, exactly one month after Appellant's trial. At the time of Appellant's trial the established Virginia judicial authority, as stated in *Farmer v. Commonwealth*, supra, allowed introduction of evidence of prior convictions during the trial phase in driving under the influence cases. However, it is important to note that *Farmer* is a judicial interpretation of the relevant Virginia statutes.

It is Appellant's contention that Section 18.2-266 of the Code of Virginia, which is the statute prohibiting driving under the influence of alcohol, and the entirely separate Section 18.2-270 of the Code of Virginia, which is the statute entitled, "Penalty; subsequent offense; prior conviction", were not enacted as a single statute incorporating elements of a crime from one statute into the other; rather, there is a constitutional interpretation of the two statutes which allows the statutes to stand as constitutional.

"As Justice Holmes said long ago, '[a] statute

must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score.'" *Almendarez-Torres v. U.S., at p. 237, citing United States v. Jin Fuey Moy, 241 U.S. 394, 401 (1916).*

This Court should adopt such an interpretation of the relevant statutes and hold that the crime of driving under the influence of alcohol is set forth in Section 18.2-266, regardless of the defendant's prior record of violations, and that the provisions of Section 18.2-270 as to prior convictions are sentencing elements, which are inadmissible until the guilt of the defendant has been established. The legislative action and intent by the Virginia General Assembly is not therefore affected, but the judicial interpretation of the statutes as set out in *Farmer* must, of necessity, be overturned. The reasoning in *Farmer* that the penalty provisions of Section 18.2-270 are elements of the crime of subsequent offense of driving under the influence (arrived at only by reading two non-consecutive statutes as one) is fatally inconsistent with the discussion in *Almendarez-Torres.*

"We also note that the 'title of a statute and the heading of a section' are 'tools available for the resolution of a doubt' about the meaning of a statute. *Trainmen v. Baltimore & Ohio R.Co. 331 U.S. 519, 528-529 (1947)*"..."A title that contains the word "penalties" more often, but certainly not always, see *post*, at 14-15, signals a provision that deals with penalties for a substantive crime."

"In this instance the amendment's title does

> not reflect careless, or mistaken, drafting, for the title is reinforced by a legislative history that speaks about, and only about, the creation of new penalties." *Almendarez-Torres v. U.S.*, supra, at 234.

The same is true of the development of Virginia Code Section 18.2-270, the "penalty" section. While the wording of Virginia Code Section 18.2-266, the "DUI" section has remained substantially the same for years, 18.2-270 has changed almost yearly to reflect the legislature's desire to punish repeat offenders more harshly.

This Court in *Almendarez-Torres* then discussed the alternative, and stated:

> "Finally, the contrary interpretation--a substantive criminal offense--risks unfairness. If subsection (b)(2) sets forth a separate crime, the Government would be required to prove to the jury that the defendant was previously deported 'subsequent to a conviction for commission of an aggravated felony.' As this Court has long recognized, the introduction of evidence of a defendant's prior crimes risks significant prejudice. See, *e.g.*, *Spencer v. Texas*, 385 U.S. 554, 560 (1967) (evidence of prior crimes 'is generally recognized to have potentiality for prejudice')." *Almendarez-Torres*, supra, at 234-235.

Spencer v. Texas, supra, upheld, primarily on "state's rights" grounds, the Texas legislature's decision to allow evidence of prior crimes in the trial phase; however, the method then provided by Texas was for a "unitary"

trial, where the guilt and the sentence was established in the same trial, by the same jury. Justice Harlan, writing the opinion in *Spencer*, discussed at some length the fact that the method chosen by the Texas legislature, was not a preferred method, but bowed to the legislature because of the unitary type of trial which was used, and further commented that the Texas legislature had changed its method of conducting such trials while the *Spencer* case was on appeal.

Virginia on the other hand, uses a bifurcated trial for DUI cases [See Virginia Code Section 46.2-943, 46.2-382 and 19.2-295.1; Virginia has, since Appellant's case has been on appeal, provided in Section 18.2-270 that a third offense of DUI within ten years, is now a felony; however, at the time of Appellant was charged, a third offense was a Class 1 misdemeanor, just as was a first offense, and the provisions of 18.2-270 only increased the minimum sentence he could receive]. There is no valid reason for admitting such prior conviction evidence in the guilt or innocence phase of a trial. In fact, it is submitted that a jury which heard a DUI case in which the Defendant professed his innocence, but still returned a guilty verdict, and then learned that the Defendant had been convicted several times previously, would almost certainly give a stiffer sentence than if they knew of his record in the first phase of the trial.

While it is certainly true that legislatures may establish certain laws which allow evidence of prior crimes to increase the sentence for the same crime or to define, as crime elements, certain acts to increase punishment [See *United States v. Fenner*, supra (use of a firearm by a person while committing a crime of violence, and being a felon in possession of a firearm); and *Jones v. United States*, supra, (use of a firearm or force in a car

jacking)], such is not the case for a law in which the elements of the crime are exactly the same for a first offense or for a twentieth offense, as is the case in the applicable Virginia statute on DUI. (18.2-266) See *U.S. v. Davis*, supra, in which the U.S. Court of Appeals for the Fourth Circuit, citing *Almendarez-Torres*, said: "Any argument whether the defendant is a repeat offender is an offense element is foreclosed by the Supreme Court's recent decision in *Almendarez-Torres*." *U.S. v. Davis*, supra, at 373, n. 6.

Question 2:

Appellant has gone into considerable detail in the Statement of Facts as to the seriously conflicting evidence of the prosecution. The jury ignored those conflicts, and the unimpeached evidence of the defense which could be reconciled with the evidence of Messrs. Kensy and Bird, the two lay prosecution witnesses. Instead the jury believed the evidence of the police officer which was irreconcilable with the testimony of Messrs. Kensy and Bird, in many accounts. The jury absolutely ignored the statements of Kensy and Bird that the officer told them he was around the side of the building when he "heard" the noise; if Kensy and Bird were to be believed at all, and not a word of their testimony was impeached, then the officer could not have seen the vehicle hit the building, and therefore could not have seen Mr. Hamrick exit the vehicle and leave in his own car.

As a matter of Due Process alone, reasonable doubt as to the guilt of the Appellant existed; therefore, it is the prejudice toward the Appellant by the jury as a result of their knowledge of his prior DUI convictions that allowed them to ignore clear evidence of Appellant's innocence. It is absolutely essential to point out that this is not a "garden variety" case of where the prosecution evidence and the defense evidence conflict, and the jury has the

right to decide who to believe. This is a case in which the evidence of the prosecution is irreconcilable as to material facts, and Kensy and Bird, as equally believable witnesses as the police officer, testified in a manner that could be reconciled with the evidence of the defense as to Appellant's innocence.

The failure of the jury to consider the exculpatory evidence, and to never even consider the sketch (Defendant's Trial Exhibit 7) which showed where each witness testified events occurred, is a clear indication of the fact that Appellant did not receive Due Process of the Law, nor was he tried by a fair and impartial jury.

Question 3:

The refusal of the Supreme Court of Virginia to remand this matter back to the trial court for findings of fact as to the extreme prejudice alleged by the Appellant in its Motion Of Appellant For Remand, Or For Dismissal, violates his rights to a trial by a fair and impartial jury, under the Sixth Amendment to the U.S. Constitution, as applied to the states by the Fourteenth Amendment to the U.S. Constitution, and to Due Process of Law under the Fourteenth Amendment to the U.S. Constitution.

As stated in said Motion, the Appellant learned, only after the matter was before the Virginia Supreme Court on his Petition for Appeal, that the foreman of the jury which convicted him was a convicted felon, and that further, the same juror had made statements to others prior to the trial of the Appellant, that showed extreme animus toward the Appellant. The Supreme Court refused to remand the case for such findings of fact in its Order of December 14, 2000.

It is true that a Virginia appellate decision has held

that the after-acquired knowledge of the presence of a convicted felon on a jury (felons being ineligible to serve on juries by virtue of Section 8.01-338 of the Code of Virginia) does not automatically vitiate the jury verdict. *Mighty v. Commonwealth*, 17 Va. App. 495, 438 S.E.2d 495 (1993). However, the opinion in *Mighty* did state that a guilty verdict could be overturned if the defendant could show that the presence of the felon on the jury would "probably cause injustice" to the defendant. *Mighty*, at p. 497.

However, the reliance of the Virginia appellate court on Section 8.01-352 for remedy of this defect does not cure the denial of Appellant's rights to a trial by a fair and impartial jury under the Sixth Amendment to the U.S. Constitution, or to Due Process under the Fourteenth Amendment to the U.S. Constitution. Appellant was entitled to a hearing on his allegation to determine if the jury was fair and impartial, or if he received Due Process of Law under both state law and under the Sixth Amendment and the Fourteenth Amendment.

It is telling that the response of the Town to Appellant's motion, which was filed with the Supreme Court of Virginia does not deny that the juror was a convicted felon. The comment in the Town's response that the Appellant should have attached a copy of the juror's criminal record is disingenuous, as the Town's attorney knew full well that the Appellant is not entitled to obtain a copy of a criminal record of a juror, and Appellant's attorney certifies to this court that the allegation of the juror's felony conviction was properly confirmed by another attorney representing the Town of Front Royal, when Appellant's attorney requested confirmation or denial of said fact. Appellant provided great detail as to the date and place, and type of conviction in his Motion for Remand, Or For Dismissal, which was not denied by

Appellee, who had access to said information. Appellant's counsel, by his signature to the motion, gave his certification that the information was true and correct, and Appellant should have been given an opportunity to establish said allegations in a court proceeding.

As a result, and particularly since the Attorney representing the Appellee knew the information as to the felony conviction of the juror was correct, the matter should have been remanded to the trial court for a hearing on the allegations in the Motion Of Appellant For Remand, Or For Dismissal. Failure to do so denied the Appellant to his rights under the Sixth and Fourteenth Amendments of the U.S. Constitution. *Turner v. Louisiana*, 379 U.S. 466 (1965); *Parker v. Gladden*, 385 U.S. 363 (1966).

In *Turner*, supra, two Deputy Sheriffs attending the trial freely mingled and conversed with the jurors during the trial, and defense counsel objected to the practice, but was overruled. The Louisiana state appellate court ruled similarly to the Virginia appellate court in *Mighty*, supra, requiring a showing of actual prejudice. However, this court found that the practice violated Turner's right to a fair hearing under the Fourteenth Amendment.

> **"'In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process. *In re Oliver*, 333 U.S. 257; *Tumey v. Ohio*, 273 U.S. 510. 'A fair trial in a fair tribunal is a basic requirement of due process.' *In re Murchison*, 349 U.S. 133, 136." *Turner*, at 471, 472.**

In *Parker v. Gladden*, 385 U.S. 363 (1966), this Court reversed another conviction on grounds more similar to the case on appeal here. After Parker's conviction in a jury trial, defendant's attorney found at a hearing on post-conviction relief that a bailiff had made a statement to a sequestered juror, "Oh, that wicked fellow, he is guilty.", and to another juror, "If there is anything wrong [in finding him guilty] the Supreme Court will correct it." *Parker*, supra, at 363, 364. The trial court granted a new trial, but the Oregon Supreme Court reversed, finding that "the bailiff's misconduct did not deprive [Petitioner] of a constitutionally correct trial." *Parker*, supra, at 364. This Court did not support the finding of the Oregon appellate court, even though the issue was not raised until after the verdict was rendered, and reversed Parker's conviction.

> "As we said in *Turner v. Louisiana*, 379 U.S. 466, 472-473 (1965), 'the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel.'" *Parker*, at 364.

In this case, there was a clear allegation of undisclosed prior animus by the juror toward the Appellant. Further, there was a clear allegation that the juror himself has stated to the Appellant that the primary basis of discussion in the jury room as to the Appellant's guilt or innocence on the charge was that Appellant had been convicted of Driving Under the Influence twice previously. The improper discussion by the jury as to prior convictions of the Appellant is a part of other Questions presented by this appeal, and is further evidence of the prejudice suffered by Appellant by the

disclosure of prior convictions to the jury.

It is clear that the Appellant's rights under the Sixth Amendment and the Fourteenth Amendment required that a fact finding hearing be held as to the allegation of a lack of impartiality, incompetence to serve as a juror, and as to the improper discussions of Appellant's prior convictions as a basis for a finding of guilt in his present trial.

"PLAIN ERROR" DOCTRINE DEMANDS THAT THIS COURT SHOULD ENTERTAIN THIS APPEAL

Although it is true that the admission of Appellant's prior convictions to the jury in the guilty or innocence phase of the trial was not objected to by defense counsel, and was not precisely reserved for appeal at trial, there is ample authority from this Court and from the U.S. Court of Appeals for the Fourth Circuit that this Court should entertain this appeal.

Rule 52 (b) of the Federal Rules of Criminal Procedure, allows any federal appellate court to consider a issue that was not preserved at trial, if the error was "Plain". This approach should also be applied to the case at hand. See *United States v. Olano*, 507 U.S. 725 (1993); *United States v. David*, 83 F.3d 638 (1996); *Johnson v. United States*, 520 U.S. 461 (1997); and *United States v. Hastings*, 134 F.3d 235 (1998).

Olano set forth three requirements before an appellate court can correct an error not raised at trial: 1) "error"; 2) that is "plain"; and 3) that "affects] substantial rights." *Id*, at 730-732. In *U.S. v. David*, supra, at 641, the U.S. Court of Appeals pointed out a fourth requirement stated in *Olano*: that the "error 'seriously affects] the

fairness, integrity or public relations of judicial proceedings.' *Id,* (quoting *United States v. Young,* 470 U.S. 1, 15 (1985) (quoting *United States v. Atkinson,* 297 U.S. 157, 160 (1936)"

In *U.S. v. David,* supra, The U.S. Court of Appeals held that "error" exists and is "plain" where the law was clearly established at the time of trial, and that an objection would have been baseless, and merely time-consuming, but that by the time of the appeal, the law had changed so that the previously established law was no longer in effect. In *Johnson v. United States,* supra, this Court adopted the *U. S. v. David* holding, and further stated:

> "The government contends that for an error to be "plain", it must have been so both at the time of trial and at the time of appellate consideration. In this case, it says, petitioner should have objected t the court's deciding the issue of materiality, even though near-uniform precedent both from this Court and from the Courts of Appeals held that course proper. Petitioner, on the other hand, urges that such a rule would result in counsel's inevitably making a long and virtually useless laundry list of objections to rulings that were plainly supported by existing precedent. We agree with petitioner on this point, and hold that in a case such as this--where the law at the time of trial was settled and clearly contrary to the law at the time of appeal--it is sufficient that the error be plain at the time of appellate consideration." *Johnson v. United States,* supra, at 468.

In this case under appeal, the law, as to the admissibility of evidence of prior convictions in a subsequent offense DUI trial before guilt or innocence was decided, was clear and unequivocal; defense counsel could not be held to know that 30 days after the trial of Appellant, the U.S. Supreme Court would issue the decision in *Almendarez-Torres*. It is also "plain" and "clear" now that the admission of such prior conviction evidence as previously allowed by Virginia courts in *Farmer*, is no longer proper, and is now "error".

As to whether the admission "affected substantial rights", one only needs to refer to *U.S. v. Olano*, supra:

> "We need not decide whether the phrase "affecting substantial rights" is always synonymous with "prejudicial." *See generally Arizona v. Fulminante*, 499 U.S. 279, 310 (1991) (constitutional error may not be found harmless if error deprives defendant of the "'basic protections [without which] a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded a fundamentally fair'" (quoting *Rose v. Clark*, 478 U.S. 570, 577-578 (1986)." *U.S. v. Olano*, supra, at 735.

From *Spencer v. Texas*, supra, to *Almendarez-Torres*, supra, and beyond, it clear that evidence of prior criminal activity is known to have a strong likelihood of prejudicing a jury against a defendant. So the third prong of the test in *U.S. v. Olano*, supra, is met.

This case also meets the fourth prong of the test:

that the error seriously affected the fairness, integrity or public reputation of judicial proceedings. In this case, the Appellant has always protested his innocence, and has produced several witnesses who also support his innocence. Even the two lay witnesses for the prosecution testified in a way that could be reconciled with the innocence of the Appellant. this is not a case such as that in *Johnson v. United States*, supra; in that case, the Defendant had admitted that the false statement which she gave was "material", and therefore her guilt was established, even though the trial court had unconstitutionally assumed the responsibility for determining the issue of "materiality" to himself. So the failure of the appellate Court in *Johnson v. United States*, supra, to consider the appeal did not offend or affect the fairness, integrity or public reputation of judicial proceedings. In this case, the opposite is clearly obvious. The Appellant did not have an unbiased jury to consider the evidence against him, or for him.

CONCLUSION:

There are important constitutional questions to be determined, and the cited Virginia statutes and judicial holdings are in conflict with the clear holdings of this Court and the U.S. Court of Appeals for the Fourth Circuit. It is necessary that this Court grant the Petition for Writ of Certiorari in order to protect the fundamental constitutional rights of the Appellant, and in order to settle the disparity between Virginia judicial holdings and legislative acts, and the clear holdings on these issues by the federal appellate courts.

Appellant's conviction should be reversed and dismissed because, absent the prejudicial evidence of prior convictions presented to the jury, there is such an internal conflict in the prosecution's case that reasonable doubt as to guilt exists *per se*. In the event that this Honorable court

takes this appeal, and does not rule that reasonable doubt exists *per se*, the case should be remanded for a new trial in conformity with this Court's rulings.

Franklin B. Reynolds, Jr.
counsel for Appellant
(Admission applied for)

APPENDIX

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APPENDIX A — MEMORANDUM OPINION OF THE COURT OF APPEALS OF VIRGINIA DATED FEBRUARY 20, 2000

COURT OF APPEALS OF VIRGINIA

Present: Chief Judge Fitzpatrick, Judge Benton and Senior Judge Duff
Argued at Alexandria, Virginia

Record No. 0559-99-4

RAY MILTON PENNINGTON, III

v.

TOWN OF FRONT ROYAL

MEMORANDUM OPINION*
BY CHIEF JUDGE JOHANNA L. FITZPATRICK
FEBRUARY 29, 2000

FROM THE CIRCUIT COURT OF WARREN COUNTY
Dennis L. Hupp, Judge

Franklin B. Reynolds, Jr., for appellant.

John B. Arledge (Smith and Davenport, on brief), for appellee.

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* Pursuant to Code § 17.1-413, recodifying Code § 17-116.010, this opinion is not designated for publication.

Appendix A

Ray Milton Pennington, III, (appellant) was convicted in a jury trial of driving under the influence of alcohol, third offense, in violation of Front Royal Town Ordinance 156-8. On appeal, he contends that: (1) the certificate of blood alcohol analysis was inadmissible, (2) evidence of his two prior convictions of driving under the influence of alcohol violated due process; (3) the evidence was insufficient to support the conviction; (4) his post-trial request for two subpoenas *duces tecum* should have been granted; and (5) the enhanced punishment for a third offense was constitutionally impermissible. For the following reasons, we affirm.

I.

Under familiar principles of appellate review, we examine the evidence in the light most favorable to the Town of Front Royal (Town), the prevailing-party below, granting to it all reasonable inferences fairly deducible therefrom. *See Juares v. Commonwealth*, 26 Va. App. 154, 156, 493 S.E.2d 677, 678 (1997). So viewed, the evidence established that on October 10, 1997, at approximately 2:00 a.m., Officer Charles Robinson (Robinson) was conducting a business check at the Grapevine Restaurant in the Town of Front Royal. While standing in the front parking lot of the restaurant, Robinson saw a truck turn into the lot, pass by him, and strike one of the supports on the building. Although the officer did not see the driver of the truck as it entered the parking lot, he immediately approached the vehicle and discovered appellant behind the wheel. Robinson testified: "As I approached the vehicle, on the driver's side coming up from the rear, I observed [appellant] sitting behind the

driver's seat." The officer did not see anyone else get out of the truck or any other vehicles in the parking lot.

Robinson asked appellant to get out of the truck, and he "immediately detected a strong odor of an alcohol beverage coming from [appellant's] breath." The officer administered a preliminary breath test and asked appellant to perform various field sobriety tests, which appellant failed to complete satisfactorily. After being advised of the implied consent law and *Miranda* rights, appellant agreed to take a breathalyzer test, which indicated a blood alcohol concentration of 0.19. At no time during the investigation did appellant state that another person was driving the truck.

At trial, the Town presented the testimony of Officer Robinson, Kirk Kensy (Kensy) and Robert Bird (Bird). Kensy and Bird, who lived in the apartment above the Grapevine Restaurant, heard the truck strike the support post on the building. Bird immediately called 911, but when he saw Officer Robinson outside he told the dispatcher "that there was a police officer on the scene" and hung up the telephone. Neither Kensy nor Bird witnessed any person other than appellant in the truck.

In his defense, appellant called witnesses, including Bruce Hartz (Hartz) and Shawn Hamrick (Hamrick), who testified that Hamrick was driving appellant's truck. Hartz, Hamrick and appellant were drinking at the Mightyfine Restaurant on October 10, 1997. According to Hartz, when the three left the restaurant at approximately 2:00 a.m., [Hamrick] got behind the driver's seat. [Appellant] got in the passenger's seat of his vehicle. I got into the driver's

seat of my vehicle." Hartz watched as Hamrick drove appellant's truck towards the Grapevine Restaurant. Both Hamrick and appellant testified that Hamrick was driving the truck when it entered the parking lot at the Grapevine Restaurant and struck the support post of the building.

To support the enhanced punished for a third offense, the town introduced evidence that on September 27, 1991, appellant was convicted of driving under the influence of alcohol, in violation of Code § 18.2-266. Additionally, on December 23, 1993, appellant was charged with driving under the influence of alcohol, second offense, in violation of Code § 18.2-266. That charge was reduced, and appellant was convicted on May 20, 1994 of driving under the influence of alcohol, first offense.[1]

The jury accepted the Town's evidence and rejected appellant's testimony. Appellant was found guilty of driving under the influence of alcohol, third offense, in violation of Front Royal Town Ordinance 156-8. In a post-trial motion to set aside the jury's verdict, appellant argued that his 1994 conviction was based upon an invalid ordinance. Additionally, appellant requested the trial court to issue two subpoenas *duces tecum*, seeking from the sheriff and police

1. In his post-trial motions and in his brief on appeal, appellant argued that the May 1994 conviction was based upon a violation of Town of Warrenton Ordinance 1993-9 and that the conviction was constitutionally void subject to collateral attack. Throughout the proceedings, the parties mistakenly beliefed the May 1994 conviction was for a violation of the local ordinance; however, the record before us demonstrates that appellant was convicted for a violation of Code § 18.2-266, a state statute.

department records of 911 calls and radio transmissions.[2] The trial court denied appellant's post-trial motion to set aside the verdict and granted the Town's motion to quash the request for subpoenas.

II. Certificate of Analysis

At trial, appellant objected to the admission of the certificate of analysis because the officer did not witness appellant operating a motor vehicle "upon a highway." *See* Code § 46.2-100. He contends that Officer Robinson's "testimony could not form a credible basis for . . . finding that Appellant actually operated a motor vehicle at any time . . . ." He asserts that because no credible evidence established that appellant operated a motor vehicle "upon a highway," the certificate of analysis was inadmissible. We disagree.

Code § 46.2-100 defines "highway" as:

> [T]he entire width between the boundary lines of every way or place open to the use of the public for purposes of vehicular travel in the Commonwealth, including the streets and alleys, and for law enforcement purposes, the entire width between the boundary lines of all private roads of private streets which have been designated "highways" by an ordinance adopted by the

2. Appellant did not include in the Appendix a transcript of the post-trial hearings and, therefore, we are unable to determine what arguments were made at that time.

> governing body of the county, city, or town in which such private roads or streets are located.

"[T]he test for determining whether a way is a 'highway' depends upon the degree to which the way is open to public use for vehicular traffic." *Roberts v. Commonwealth*, 28 Va. App. 401, 403, 504 S.E.2d 890, 891 (1998) (quoting *Furman v. Call*, 234 Va. 437, 439, 362 S.E.2d 709, 710 (1987)).

We have previously held that a private parking lot of a business is not a "highway" within the meaning of Code § 46.2-100 because "the parking lots were not open to the public at all times, but instead 'were open to the public upon . . . invitation.' " *Flinchman v. Commonwealth*, 24 Va. App. 734, 737, 485 S.E.2d 630, 631 (1997); *see also Roberts*, 28 Va. App. at 406, 504 S.E.2d at 892 (holding that a convenience store parking lot was privately owned property and, thus, not a "highway" as defined by Code § 46.2-100).

In the instant case, we do not reach the question whether the Grapevine Restaurant parking lot was a "highway" under Code § 46.2-100. Officer Robinson testified that he witnessed appellant's truck being driven on a public roadway before entry into the parking lot. Shortly thereafter, he approached the truck where he found appellant, the only occupant, sitting in the driver's seat. From this evidence, the trial court concluded that appellant was the person operating the motor vehicle "upon a highway" when the officer saw it travelling on the public road and, thus, the certificate of analysis was properly admitted.

III. Prior Convictions

Appellant next contends that the trial court erred in admitting his two prior convictions as predicate offenses to the instant charge. He argues that our holding in *Farmer v. Commonwealth*, 10 Va. App. 175, 390 S.E.2d 775 (1990), was erroneously decided and that the introduction of the predicate offenses violated his right to due process. At trial, appellant did not object to the admission of the two prior convictions and only did so in his post-trial motion.

"In order to be considered on appeal, an objection must be timely made and the grounds stated with specificity." *McLean v. Commonwealth*, 30 Va. App. 322, 329, 516 S.E.2d 717, 720 (1999) (*en banc*). "To be timely, an objection must be made when the occasion arises — at the time the evidence is offered or the statement made." *Id.* Because the objection was not timely made, Rule 5A:18 bars our consideration of this issue on appeal. Moreover, the record does not reflect any reason to invoke the good cause or ends of justice exception to Rule 5A:18.

IV. Sufficiency of the Evidence

Appellant next contends the evidence was insufficient to support his conviction. He argues that the Town's evidence was "internally conflicting as to the amount of time that passed, the location of the police Officer at the time of the crash, and the knowledge of the police Officer of [sic] as to how the incident occurred."

Viewed in the light most favorable to the Town, as the prevailing party below, the evidence established that Officer Robinson saw appellant's truck turn off a public roadway into the parking lot where he was standing. Although the truck's headlights temporarily blinded him as it passed by, Robinson heard the truck strike a support post of the building. After the truck stopped, and within a matter of "twenty/thirty seconds," Robinson approached and found appellant sitting in the driver's seat. Robinson did not see any other vehicles in the parking lot or any other person exit appellant's truck. Additionally, two other independent witnesses, Kensy and Bird, saw no one but appellant in or exiting appellant's truck. The Town's witnesses were unanimous in their testimony that appellant was the truck's sole occupant.

The jury believed the Town's evidence and rejected appellant's evidence that Hamrick had been driving the truck. *See Montgomery v. Commonwealth*, 221 Va. 188, 190, 269 S.E.2d 352, 353 (1980) (per curiam) ("[E]ven if the defendant's story was not inherently incredible, the trier of fact need not have believed the explanation."); *Marable v. Commonwealth*, 27 Va. App. 505, 509-10, 500 S.E.2d 233, 235 (1989) ("In its role of judging witness credibility, the fact finder is entitled to disbelieve the self-serving testimony of the accused and to conclude that the accused is lying to conceal his guilt."). The Town's evidence was competent, was not inherently incredible, and was sufficient to prove beyond a reasonable doubt that appellant was driving the truck.

V. Subpoenas *Duces Tecum*

Appellant next contends the trial court erred in granting the town's motion to quash his post-trial request for two subpoenas *duces tecum*. Approximately three months after trial, appellant filed two requests to be served upon the Sheriff of Warren County and the Front Royal Chief of Police, seeking records of any 911 calls made regarding appellant's arrest. Appellant also sought records regarding radio transmissions to and from the sheriff and police department. In its letter opinion, the trial court considered appellant's requests as an attempt to secure new evidence, stating the following:

> It appears to me that the Defendant is seeking to set aside the verdict on grounds of after-discovered evidence. The evidence sought certainly could have been discovered before trial. One of the rules governing the use of after-discovered evidence as a basis for setting aside a jury verdict requires that the evidence "be such as could not, by the exercise of diligence, have been discovered before the trial terminated." *Pauley v. Commonwealth*, 151 Va. 510 at 517-518 (1928) . . . .

The trial court concluded appellant had not shown why the evidence could not have been secured prior to trial and, therefore, granted the Town's motion to quash the requests for the subpoenas.

When a defendant seeks to challenge a verdict with "after-discovered" evidence, the decision to set aside the

verdict and grant a new trial is left within the sound discretion of the trial judge.

> The [defendant] bears the burden to establish that the evidence (1) appears to have been discovered subsequent to the trial; (2) could not have been secured for use at the trial in the exercise of reasonable diligence by the movant; (3) is not merely cumulative, corroborative or collateral; and (4) is material, and such as should produce opposite results on the merits at another trial.

Stockton v. Commonwealth, 227 Va. 124, 149, 314 S.E.2d 371, 387 (1984), *cert. denied*, 469 U.S. 873 (1984). Additionally, when seeking exculpatory evidence, a defendant "cannot simply allege the presence of favorable material and win reversal of his conviction. Rather, a defendant must prove the favorable character of evidence he claims has been improperly suppressed. Speculative allegations are not adequate." *Hughes v. Commonwealth*, 18 Va. App. 510, 526, 446 S.E.2d 451, 461 (1994) (*en banc*) (citations omitted).

In the instant case, appellant failed to establish why he did not secure the requested evidence prior to trial. While the Town was obligated to provide appellant with exculpatory evidence known to it under *Brandy v. Maryland*, 373 U.S. 83 (1963), appellant has not alleged that the Town withheld any such evidence. Finally, appellant did not show that the requested evidence was material to the proceedings. "A subpoena *duces tecum* should not be used when it is not intended to produce evidentiary materials but is intended as

a 'fishing expedition' in the hope of uncovering information material to the defendant's case." *Farish v. Commonwealth*, 2 Va. App. 627, 630, 346 S.E.2d 736, 738 (1986). Accordingly, the trial court did not abuse its discretion in granting the Town's motion to quash.

VI. Void Conviction

Finally, appellant contends that the enhanced punishment, as a third offense, was invalid because it was based upon a prior conviction of driving while intoxicated in violation of Town of Warrenton Ordinance 1993-9, an ordinance that he argues is void. *See Town of Madison, Inc. v. Ford*, 255 Va. 429, 498 S.E.2d 235 (1998); *Pound v. Town of Front Royal*, Record No. 2148-96-4 (May 5, 1998) (unpublished). However, the record clearly establishes that appellant was convicted of a state statute and not a local ordinance. The warrant of arrest provides: "[O]n or about DEC. 23, 1993 [appellant] did unlawfully *in violation of Section 18.2-266*, . . . OPERATE A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF ALCOHOL. SECOND OFFENSE IN THE PAST FIVE YEARS." (Emphasis added). Although the warrant was amended to a violation of driving under the influence of alcohol, first offense, there was no amendment regarding the charged violation. Because appellant was convicted of Code § 18.2-266, his constitutional challenge to the Town of Warrenton's local ordinance is without merit.

Nonetheless, appellant contends that to attain the "ends of justice," we should consider "the May 20, 1994 conviction as a conviction under the Town of Warrenton local ordinance." He argues that the Town of Warrenton was the prosecuting party,

both parties involved believed the warrant charged a violation of the local ordinance, and appellant's driving record indicated that the 1994 conviction was based upon a local ordinance violation. Accordingly, appellant concludes, we should "make a determination that the May 20, 1994 conviction was a conviction under the local Warrenton Ordinance, and therefore Appellant's arguments regarding the voidness of that Ordinance maybe considered." Appellant cites no cases in support of this proposition.

Although appellant's driving record indicates that the 1994 conviction was based upon a violation for "LOCAL ORDINANCE: WARRENTON," the order of conviction clearly establishes that appellant was charged and convicted for a violation of the Virginia Code. "When a court not of record tries a defendant on a criminal charge, it is required to memorialize its judgment by setting forth '[the defendant's] plea, [the court's] verdict or findings and the adjudication and sentence." *McBride v. Commonwealth*, 24 Va. App. 30, 34-35, 480 S.E.2d 126, 128 (1997) (quoting Code § 19.2-307) (other citations omitted) (alterations in original). "A court speaks through its orders and those orders are presumed to accurately reflect what transpired." *Id.* at 35, 480 S.E.2d at 128 (citations omitted). Because the record reflects that appellant was found guilty of violating Code § 18.2-266, and at no time was the warrant amended to reflect a violation of the local ordinance, appellant has no basis to challenge that local ordinance.[3]

3. Assuming, without deciding, that an "ends of justice" exception applies to this situation, we find no reason to invoke it. "The defendant, having agreed upon the action taken by the trial court [in the May 1994 proceedings], should not be allowed to assume an inconsistent position." *Manns v. Commonwealth*, 13 Va. App. 677, 679-80, 414 S.E.2d 613, 615 (1992).

For the foregoing reasons, appellant's conviction is affirmed.

Affirmed.

A Copy,

Teste:

Cynthia L. McCoy, Clerk

By: s/ [illegible]
Deputy Clerk

Appendix A

VIRGINIA

In the Court of Appeals of Virginia on Tuesday *the* 29th *day of* February, 2000.

Record No. 0559-99-4
Circuit Court No. CR97000461-00

Ray Milton Pennington, III,

Appellant,

against

Town of Front Royal,

Appellee.

From the Circuit Court of Warren County Before Chief Judge Fitzpatrick, Judge Benton and Senior Judge Duff

For reasons stated in writing and filed with the record, the judgment appealed from is affirmed.

This order shall be certified to the trial court.

A Copy,
Teste:
Cynthia L. McCoy, Clerk

By: s/ [illegible]
Deputy Clerk

APPENDIX B — LETTER FROM HON. DENNIS L. HUPP OF THE COMMONWEALTH OF VIRGINIA, TWENTY-SIXTH JUDICIAL CIRCUIT TO FRANKLIN B. REYNOLDS, JR., ESQ., JAMES H. ALLAMONG, ESQ., AND JOHN B. ARLEDGE, ESQ. DATED JUNE 5, 1998

COMMONWEALTH OF VIRGINIA
Twenty-Sixth Judicial Circuit

* * *

June 5, 1998

Franklin B. Reynolds, Jr., Esquire
389 E. Main Street
Washington, VA 22747

James H. Allamong, Esquire
109 E. King Street
Strasburg, VA 22657

John B. Arledge, Esquire
16 North Royal Avenue
Front Royal, VA 22630

RE: Town of Front Royal v. Ray Milton Pennington, III
Law No. 97000461 (Misdemeanor Appeal)
Warren County Circuit Court

Gentlemen:

This case was argued before me on June 1, 1998, on the defendant's motion to set aside the jury verdict. The defendant had been tried before a misdemeanor venire

on February 24, 1998, and found guilty of operating a motor vehicle while under the influence of alcohol, having been convicted twice before within the past ten (10) years of the same or similar offense. The jury fixed punishment at six (6) months in jail and a fine of $2,500.00.

The defendant raised five (5) grounds for the setting aside of the verdict. I will address each separately.

(1) *Jury Prejudice* — The defendant alleges that one of the jurors was a creditor of Bruce Hartz, one of the defendant's witnesses, and that Bruce Hartz had declared bankruptcy. It is my understanding that the bankruptcy case is still pending. The defendant suggests that this juror would naturally have animosity towards Hartz which would impact upon the juror's view of his credibility. No inquiry was made during *voir dire* specifically relating to this situation because the defendant's attorney was unaware of this. I assume the defendant was unaware as well. The juror did acknowledge that she knew Mr. Hartz but stated, under oath, that Mr. Hartz's testifying for one side would not prevent her from being a fair and impartial juror and that she would not tend to give Mr. Hartz's testimony more or less weight than that of another witness simply because of her acquaintance with him.

Given the juror's responses, I find no prejudice in her having served on this jury. See *Green v. Commonwealth* 26 Va. App. 394 (1998); and, *Taylor v. Commonwealth*, 25 Va. App. 12 (1997).

(2) *Breath Certificate* — The defendant contends that the breath certificate reflecting his blood alcohol content should have been excluded from the evidence because the driving conduct which furnished probable cause for the officer to approach and detain the defendant occurred on private property not on a public highway. Accepting Officer Robinson's testimony as true for the purpose of this argument, the defendant recounts his testimony that he saw the vehicle being operated on Commerce Avenue (a public highway) at a very slow speed and then turn into the parking lot (private property). Only when the vehicle struck the building adjacent to the parking lot did the officer have probable cause to make a stop. Hence, the defendant argues, the implied consent law does not apply.

Virginia Code Section 18.2-268.2(A) provides that any person who operates a motor vehicle on a public highway shall be deemed to have consented to the taking of a sample of his breath or blood for testing if he is arrested within two hours of his driving. Here, the Officer testified that he saw the vehicle being operated on a public highway, saw the vehicle turn off the public highway into a parking lot and saw the vehicle strike a building adjacent to the parking lot before coming to rest at another location within that same parking lot. The officer almost immediately approached the vehicle, and the arrest occurred well within the two hour limit. In my opinion, it makes no difference when the probable cause for the stop arose. According to the officer, the defendant was operating a motor vehicle on a public highway and thereby impliedly consented to having the breath test administered. The probable cause for the stop is a separate issue, and there is no question that the officer had

the right to investigate and detain the defendant under the circumstances as he found them.

(3) *Exhibit 7 (Sketch)* — The defendant testified that Exhibit 7, which was a large sketch of the scene, was not sent to the jury room during deliberations. For the purpose of ruling on this issue, I will accept the defendant's testimony as true. (I do not recall whether the exhibit was sent to the jury room.) I did intend that the exhibit be sent to the jury room and stated this at the time I sent the jury out for deliberations.

It is not mandatory that exhibits be submitted to the jury during deliberations. Virginia Code Section 8.01-381. They may be sent to the jury room by leave of Court, and, upon request of any party, the Court shall instruct the jury they may request exhibits for use during deliberations. Here, the defendant did not need to make such request since the Court stated that all exhibits would be sent to the jury room. The overriding point, however, is that, under the statute, it is not necessary, as a matter of law, that the jury have all exhibits in the jury room with them. This statute has been cited and applied in a criminal case. *Pugliese v. Commonwealth*, 16 Va. App. 82 (1993).

It is not necessary that the jury take time to review the exhibits even if they do have them in the jury room with them. *Rees v. Commonwealth*, 203 Va. 850 (1962). Where it is clear that the exhibits have been seen by the jury during the course of the trial and that the exhibits were relatively simple and were thoroughly explained during testimony, it is understandable that the jury may not need additional time to review them. *Id.* In the present case, Exhibit 7 was placed

on a easel in full view of all jury members. (The defendant suggested in his testimony on June 1, that all members of the jury could not see the exhibit. I disagree. The exhibit was positioned so that all members of the jury could see it, all jurors did indeed look toward the exhibit as reference was made to it, and no complaint was made by any jury member suggesting that he or she could not see.) Each witness made reference to the sketch. Several witnesses stood beside the sketch while testifying and made markings on the sketch pertinent to their testimony. The sketch was relatively simple and easily understood. It was not a complicated exhibit which required detailed study. Indeed, I believe the jurors could absorb the information as reference was made to the sketch during testimony.

Hence, in my opinion, the absence of the exhibit from the jury room during deliberations does not render the verdict defective.

(4) *Sufficiency of the Evidence* — I believe the jury could properly convict the defendant on the evidence presented. I am not going to go through a detailed analysis of the evidence or a comparison of the facts in this case with the facts in the several cases cited by the defendant during argument. Suffice it to say that I believe these cases can be distinguished.

I will, however, address several of the factual issues which defendant stressed during argument. First, there is no evidence that Officer Robinson was behind the building at the time the vehicle struck the front of same. Two of the Commonwealth's witnesses did indeed testify that the officer told them at the scene that he had been behind the building.

Assuming that the officer did make this statement, his exact location was never established, leaving it open to interpretation as to whether he was at the side or rear of the building. If he were at the side, it is possible that he could have stepped around the corner in time to see the collision. We should not, however, belabor this point. The testimony of the two civilian witnesses concerning the statement allegedly made by the officer was elicited during cross-examination. It is evidence of a prior inconsistent statement. This relates to the credibility of the officer and should not be considered as evidence that what the officer may have said earlier is true. *Hall v. Commonwealth*, 233 Va. 369 (1987). The officer denied making the statement and testified that he was in a position to see the collision when it occurred. The jury heard all this testimony, and it was the jury's task, as trier of fact, to sort out the testimony, weigh the credibility of the various witnesses, and determine the facts of the case. It appears that they chose to believe the police officer.

The officer testified that it took him approximately 30 seconds to approach the defendant's vehicle. The two civilian witnesses testified that they came outside within two minutes of hearing the collision and found the officer still at his car. It has been my observation through the years that many persons have difficulty quantifying time. The discrepancy between 30 seconds and two minutes is a rather small one. The discrepancies concerning the location of the officer when these two exited the building does not, as a matter of law, outweigh the testimony of these same witnesses that no one other than the defendant was seen leaving the defendant's vehicle and that the defendant occupied the vehicle by himself and was in the driver's seat.

The officer's question to the building occupants as to whether they *heard* the collision is subject to more than one interpretation. The defendant argues that this suggests that the officer also only *heard* the collision and did not see it. It could just have easily have meant that the officer knew that the building occupants had not seen the collision but thought that they may have *heard* the collision. It does not necessarily suggest that he himself had not seen the collision.

The jury, of course, heard the defendant's witnesses as well, and, as trier of fact, was required to weigh the evidence and the credibility of the various witnesses and to determine the facts of the case. In doing so, they apparently chose to give great weight to the testimony of the police officer, and I do not find his testimony inherently incredible nor do I find the conflicts within the Commonwealth's case to be so substantial as to render the conviction improper.

(5) *Prior Conviction-Invalidity of Ordinance* — Mr. Reynolds raised this issue orally during argument. Mr. Arledge suggested that he had no notice that this would be an issue and asked the Court not to consider it. I suggested that I would decide the first four issues and, if I ruled against the defendant, then the defendant would be given leave to file an additional motion on his point. Accordingly, I direct the defendant to file any such motion, if he be so inclined, within 14 days of the date of this letter. The town will then have 10 days to respond in writing. I will then hear oral arguments on July 10, 1998 at 9:00 a.m., with the intention of deciding the issue on that date.

Mr. Arledge will prepare an Order incorporating the rulings made herein.

Sincerely,

s/ Dennis L. Hupp
Dennis L. Hupp

CC: Court file
DLH/gs

APPENDIX C — ORDER IN THE CIRCUIT COURT OF WARREN COUNTY DATED OCTOBER 27, 1998

VIRGINIA: IN THE CIRCUIT COURT OF WARREN COUNTY

CRIMINAL NO. CR97000461-00

TOWN OF FRONT ROYAL

Misdemeanor Appeal

v.

RAY MILTON PENNINGTON, III W-M-DOB: 07-09-53; SSN 225-80-3232

Defendant

ORDER

This 27th day of October, 1998, came the Town, by her attorney. Also came the Defendant, Ray Milton Pennington, III, in person, and by his retained counsel, Franklin B. Reynolds, Jr., Esquire, for the purpose of consideration of a pre-sentence report on the Defendant and sentencing.

WHEREUPON, counsel for the Defendant renewed his motions previously denied by the Court, which motions the Court again denies on the same grounds. The Court inquired of the Defendant if he was prepared to be adjudicated on the charge and sentenced, and the Defendant advised he was ready. The Court then received the pre-sentence report, the testimony of the probation officer and Defendant, and the

argument of counsel. In consideration thereof, the Defendant having been tried on February 24th, 1998, on a charge of Driving While Under the Influence, a third subsequent offense within 10 years, as charged in the warrant contained in the above law number, and at the trial a misdemeanor *venire* having found the Defendant guilty of the charge and fixing the punishment at 6 months in jail and a fine of $2,500^{00}$, the Court adjudicates the Defendant guilty of the charge and imposes the sentence of the *venire*. The Court finding it in the public interest suspends $1,000^{00}$ of the $2,500^{00}$ fine and 3 months of the 6 month jail sentence fixed by the *venire* for a period of three years on the following conditions:

1. The Defendant shall keep the peace and be of good behavior, violating no penal laws of any jurisdiction.

2. The Defendant shall not consume any alcohol or alcoholic beverages, or any illegal drugs or narcotics; he shall remain free of any intoxicants.

3. The Defendant shall continue his treatment and counseling with Northwestern Community Services and participation in Alcoholics Anonymous, to which the Defendant agreed and consented.

4. The Defendant shall submit, consent and cooperate in any test for intoxicants that may be requested or required by any law enforcement officer, jail staff, probation official or court personnel, with or without probable cause, to which the Defendant agreed and consented.

The Court further suspends the Defendant's privilege to operate a motor vehicle for a period of 3 years.

Thereupon, the Defendant noted his intent to appeal his adjudication and conviction, and made motion that all sentences and penalties imposed be suspended during the pendency of his appeal, which motion the Court granted. The Court continues the Defendant's $5,000^{00}$ bond on all those terms previously imposed and the above conditions. Over the objection of the Town, the Court suspends the imposed jail sentence, fine and 3 year license suspension during the pendency of the Defendant's appeal until such time as this matter may be returned to this Court after appellate review is exhausted.

The rule to show cause issued against the Defendant on the motion of the town for violation of the terms of his bond is dismissed.

The Court directs the clerk to issue a rule to show cause against the Defendant why he should not be declared an Habitual Offender which shall be returnable March 12, 1999 at 2:00 p.m. for further action by the Commonwealth.

The Clerk of this Court shall certify a copy of this Order to counsel and Northwestern Community Services upon entry. The Defendant shall have ten (10) days from the date of entry to file written objections to the form or content of this Order to the extent that the Defendant represents that it does not accurately represent the proceedings before the Court.

ENTER:

s/ Dennis L. Hupp, Judge JAN 04 1999
DENNIS L. HUPP, JUDGE (DATE)

SEEN:

s/ John B. Arledge
John B. Arledge, Town Attorney

APPENDIX D — OPINION OF THE SUPREME COURT OF VIRGINIA DENYING PETITION FOR APPEAL DATED SEPTEMBER 7, 2000

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday *the* 7th *day of* September, 2000.

Record No. 001260
Court of Appeals No. 0559-99-4

Ray Milton Pennington, III,

Appellant,

against

Town of Front Royal,

Appellee.

From the Court of Appeals of Virginia

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court refuses the petition for appeal.

Justice Lemons took no part in the consideration of this case.

A Copy,

Teste:

David B. Beach, Clerk

By: s/ Wendy L. [illegible]
Deputy Clerk

APPENDIX E — OPINION OF THE SUPREME COURT OF VIRGINIA DENYING APPELLANT'S MOTION FOR REMAND OR DISMISSAL DATED DECEMBER 14, 2000

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday *the* 14th *day of* December, 2000.

Record No. 001260
Court of Appeals No. 0559-99-4

Ray Milton Pennington, III,

Appellant,

against

Town of Front Royal,

Appellee.

Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 7th day of September, 2000 and grant a rehearing thereof, the prayer of the said petition is denied.

On further consideration whereof, appellant's motion for remand or dismissal is denied.

Justice Lemons took no part in the consideration of this case.

A Copy,

Teste:

s/ David B. Beach
Clerk

APPENDIX F — VIRGINIA STATUTORY AUTHORITIES INVOLVED IN THE CASE

Title 18.2, Section 266; Code of Virginia 1950, as amended (effective at time of trial of Appellant, and still in effect at time of appeal)

> 18.2-266. Driving motor vehicle, engine, etc., while intoxicated, etc. It shall be unlawful for any person to drive or operate any motor vehicle, engine or train (i) while such person has a blood alcohol concentration of 0.08 percent or more by weight by volume or 0.08 grams or more per 210 liters of breath as indicated by a chemical test administered as provided in this article, (ii) while such person is under the influence of alcohol, (iii) while such person is under the influence of any narcotic drug or any other self-administered intoxicant or drug of whatsoever nature, or any combination of such drugs, to a degree which impairs his ability to drive or operate any motor vehicle, engine or train safely; or (iv) while such person is under the combined influence of alcohol and any drug or drugs to a degree which impairs his ability to drive or operate any motor vehicle, engine or train safely. A charge alleging a violation of this section shall support a conviction under clauses (i), (ii), or (iii) or (iv).
>
> For the purposes of this section, the term "motor vehicle" includes mopeds, while operated on the public highways of this Commonwealth. (Code 1950, Section 18.1-54; 1960, c. 358; 1975, cc. 14, 15; 1977, c. 637; 1984, c. 666; 1986, c. 635; 1987, c. 661; 1992, c. 83; 1994, cc. 359, 363; 1996, c. 439)

Appendix F

Title 18.2-270; Code of Virginia, 1950, as amended. (in effect at the time of Appellant's trial)

18.2-270. Penalty for driving while intoxicated; subsequent offense; prior conviction. Any person violating any provision of 18.2-266 shall be guilty of a Class 1 misdemeanor.

Any person convicted of a second offense committed within less than five years after a first offense under 18.2-266 shall be punishable by a fine of not less than $200 nor more than $2,500 and by confinement in jail for not less than one month nor more than one year. Forty-eight hours of such confinement shall be a mandatory, minimum sentence not subject to suspension by the court. Any person convicted of a second offense committed within a period of five to ten years of a first offense under 18.2-266 shall be punishable by a fine of not less than $200 nor more than $2,500 and by confinement in jail for not less than one month nor more than one year. Any person convicted of a third offense or subsequent offense committed within ten years of an offense under 18.2-266 shall be punishable by a fine of not less than $500 nor more than $2,500 and by confinement in jail for not less than two months nor more than one year. Thirty days of such confinement shall be a mandatory, minimum sentence not subject to suspension by the court if the third or subsequent offense occurs within less than five years. Ten days of such

confinement shall be a mandatory, minimum sentence not subject to suspension by the court if the third or subsequent offense occurs within a period of five to ten years of a first offense.

In addition to the penalty otherwise authorized by this section or 16.1-278.9, any person convicted of a violation of 18.2-266 committed while transporting a person seventeen years of age or younger shall be (i) fined an additional minimum of $100 and not more than $500 and (ii) sentenced to perform forty hours of community service in a program benefitting children or, for a subsequent offense, eighty hours of community service in such a program.

For the purpose of this section a conviction or finding of guilty in the case of a juvenile under the following shall be considered a prior conviction: (i) the provisions of 18.2-51.4, 18.2-266, former 18.1-54 (formerly 18-75), the ordinance of any county, city or town in this Commonwealth or the laws of any other state or of the United States substantially similar to the provisions of 18.2-51.4, and 18.2-266 through 18.2-269, or (ii) the provisions of subsection A of 46.2-341.24 or the substantially similar laws of any other state or of the United States. (Code 1950, 18.1-58; 1960, c. 358; 1962, c. 302; 1975, cc. 14, 15; 1982, c. 301; 1983, c. 504; 1989, c. 705; 1991, cc. 370, 710; 1992, c. 891; 1993, c. 972; 1997, c. 691.)

Appendix F

Title 46.2; Section 943: Code of Virginia 1950, as amended

46.2-943. Court or jury may consider defendant's prior traffic record before sentencing. The term "traffic offense" when used in this section shall mean any moving traffic violations described or enumerated in subdivisions 1 and 2 of 46.2-382, whether such violation was committed within or outside the Commonwealth according to the records of the Department of Motor Vehicles.

The term "prior traffic record" when used in this section shall mean the record of prior suspensions and revocations of a driver's license, and the record of prior convictions of traffic offenses described in the foregoing provisions of this section.

When any person is found guilty of a traffic offense, the court or jury trying the case may consider the prior traffic record of the defendant before imposing sentence as provided by law. After the prior traffic record of the defendant has been introduced, the defendant shall be afforded an opportunity to present evidence limited to showing the nature of his prior convictions, suspensions, and revocations. (1975, c. 577, 46.1-347.1, 46.1-347.2; 1984, c. 780; 1989, c. 727.)

Appendix F

Title 46.2, Section 382; Code of Virginia, 1950, as amended

46.2-382. Courts to keep full records of certain cases. Every general district court or circuit court or the clerk thereof shall keep a full record of every case in which:

1. A person is charged with (i) a violation of any law of the Commonwealth pertaining to the operator or operation of a motor vehicle; (ii) a violation of any ordinance of any county, city, or town pertaining to the operator or operation of any motor vehicles, except parking regulations; (iii) any theft of a motor vehicle or unauthorized use thereof or theft of any part attached to it;

2. A person is charged with manslaughter or any other felony in the commission of which a motor vehicle was used;

3. There is rendered a judgment for damages, the rendering and nonpayment of which under the terms of this title require the Commissioner to suspend the driver's license and registration in the name of the judgment debtor. (Code 1950, 46-195, 46-414; 1952, c. 188; 1954, c. 168; 1958, c. 541, 46.1-412; 1966, c. 533; 1984, c. 780; 1989, c. 727.)

Appendix F

Title 8.01, Section 338; Code of Virginia, 1950, as amended

8.01-338. Who disqualified. The following persons shall be disqualified from serving as jurors:

1. Persons adjudicated mentally incompetent;

2. Persons convicted of treason or a felony; or

3. Any other person under a disability as defined in 8.01-2 and not included in subdivisions 1 or 2 above. (Code 1950, 8-208.3; 1973, c. 439; 1977, c. 617; 1997, c. 801.)

Title 8.01, Section 352; Code of Virginia, 1950, as amended

8.01-352. Objections to irregularities in jury lists or for legal disability; effect thereof.

A. Prior to the jury being sworn, the following objections may be made without leave of court: (i) an objection specifically pointing out the irregularity in any list or lists of jurors made by the clerk from names drawn from the jury box, or in the drawing, summoning, returning or impaneling of jurors or in copying or signing or failing to sign the list, and (ii) an objection to any juror on account of any legal disability; after the jury is sworn such objection shall be made only with leave of court.

B. Unless objection to such irregularity or disability is made pursuant to subsection A herein and unless it appears that the irregularity was intentional or that the irregularity or disability be such as to probably cause injustice in a criminal case to the commonwealth or to the accused and in a civil case to the party making the objection, then such irregularity or disability shall not be cause for summoning a new panel or juror or for setting aside a verdict or granting a new trial. (Code 1950, 2-208.7, 8-208.27, 8-208.29; 1973, c. 439; 1977, c. 617.)

Title 19.2, Section 295.1, Code of Virginia 1950, as amended

19.2-295.1. Sentencing proceeding by the jury after conviction for a felony. — In cases of trial by jury, upon a finding that the defendant is guilty of a felony, a separate proceeding limited to the ascertainment of punishment shall be held as soon as practicable before the same jury. At such proceeding, the Commonwealth shall present the defendant's prior criminal convictions by certified, attested or exemplified copies of the record of conviction, including adult convictions and juvenile convictions and adjudications of delinquency. Prior convictions shall include convictions and adjudications of delinquency under the laws of any state, the District of Columbia, the United States or its territories. The Commonwealth shall provide to the defendant fourteen days prior to trial notice of its intention to introduce evidence of the defendant's prior criminal convictions. Such notice shall include (i) the date

of each prior conviction, (ii) the name and jurisdiction of the court where each prior conviction was had, and (iii) each offense of which he was convicted. Prior to commencement of the trial, the Commonwealth shall provide to the defendant photocopies of certified copies of the defendant's prior criminal convictions which it intends to introduce at sentencing. After the Commonwealth has introduced such evidence of prior convictions, or if no such evidence is introduced, the defendant may introduce relevant, admissible evidence related to punishment. Nothing in this section shall prevent the Commonwealth or the defendant from introducing relevant, admissible evidence in rebuttal. If the defendant is found guilty of an offense other than a felony, punishment shall be fixed as otherwise provided by law.

If the jury cannot agree on a punishment, and if the defendant, the attorney for the Commonwealth, and the court agree, in the manner provided in 19.2-257, then the court shall fix punishment.

If the sentence on appeal is subsequently set aside or found invalid solely due to an error in the sentencing proceeding, the court shall impanel a different jury to ascertain punishment, unless the defendant, the attorney for the Commonwealth and the court agree, in the manner provided in 19.2-257, that the court shall fix punishment. (1994, cc. 828, 860, 862, 881; 1995, c. 567; 1996, c. 664.)

Supreme Court, U.S.
FILED
APR 18 2001
OFFICE OF THE CLERK

(2)

No. 00-1441

In The

Supreme Court of the United States

RAY MILTON PENNINGTON, III,

Petitioner,

v.

TOWN OF FRONT ROYAL, VIRGINIA,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals Of Virginia

BRIEF IN OPPOSITION

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**Counsel of Record*

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STATEMENT OF FACTS AND NATURE OF THE CASE

Respondent amplifies Petitioner's statement as follows:

On October 10, 1997, shortly after 2:00 a.m., Officer Charles Robinson of the Front Royal Police Department was conducting a business check at the Grape Vine Restaurant/Texas Spirit Saloon when he observed a pickup truck driving slowly on Commerce Avenue (Rt. 522) [Transcript of the trial (hereinafter "TR"), p. 57, *Appendix submitted to the Court of Appeals of Virginia (hereinafter "Appendix")*, Volume I, p. 236]. He watched the vehicle turn right into the common road serving the building he was checking; drive into the parking lot of the Grape Vine Restaurant/ Texas Spirit Saloon; begin to turn left toward him, *blinding him briefly with its headlights;* and then strike the front steps and support of the building [TR 60, *Appendix*, Volume I, p. 239]. The vehicle continued its turn and drove into the parking lot where it finally came to a stop. Officer Robinson had an unobstructed view of the vehicle and never lost sight of the vehicle from its operation on Commerce Avenue until it came to a stop in the flat, quiet expanse of the empty parking lot. He immediately approached the pickup truck and discovered the Petitioner, Ray Milton Pennington, the only occupant of the vehicle, behind the wheel. The officer saw the dome light of the vehicle come on for the first time when he opened the driver's door of Petitioner Pennington's vehicle. There were no other persons in the vehicle and no other persons in the area around the vehicle or leaving the area [TR 62-64 & 99-100, *Appendix*, Volume I, pp. 241-243, 278-279]. Pennington never gave any indication at the time of his arrest that anyone else had been driving his vehicle for him [TR 74-76, *Appendix*, Volume I, pp. 253-255].

Officer Robinson noticed an odor of alcoholic beverages about his person and asked Pennington to perform field sobriety tests, which the defendant substantially failed. Pennington was also given a preliminary breath test. As a result of this information, and the observations of Officer Robinson, Pennington was placed under arrest and charged with Driving Under the Influence, a *third or* subsequent offense within ten (10) years. Pennington agreed to take a breath test which showed a blood alcohol concentration of 0.19%. Neither of the citizen witnesses called by the prosecution, Kirk Kensy or Robert Bird, (who heard and felt the Petitioner's truck strike the building they occupied and who then immediately looked into the parking lot), observed any person other than Petitioner in or around the truck.

On October 21, 1997, the General District Court of Warren County, Virginia set this case for trial on November 19, 1997. At the subsequent trial, Pennington was represented by counsel and found guilty as charged. Pennington then appealed the matter to the Circuit Court. On January 9, 1998, the Circuit Court of Warren County, Virginia set this matter for trial before a misdemeanor *venire* on February 24, 1998. At the subsequent jury trial, the *venire* returned a verdict of guilty to the charge of Driving While Under the Influence, a third *or* subsequent offense within ten (10) years. After argument, including a statement made by defense counsel that if the defendant were given more than six (6) months in jail, he would not be eligible for work release [TR 250-251, 253-254, *Appendix*, Volume II, pp. 429-430, 432-433], the jury returned a sentence of six (6) months in jail and the maximum available fine of $2,500.

At no time during trial did the defendant raise objection to the validity of his prior convictions [TR 137, *Appendix*, Volume II, p. 316]. The issue of validity was first raised orally at the first hearing on Pennington's first motion to set aside the verdict on June 1, 1998, only after retaining new counsel. [Letter opinion of trial judge, *Appendix*, Volume II, p. 81] Pennington's objection was then noted in his supplemental motion to Pennington's second motion for a new trial, which was later argued on August 14, 1998.

On May 18, 1998, the trial court conducted a hearing on the Town's motion to quash Pennington's post-trial *Subpoena Duces Tecum* and granted the Town's motion for the reasons stated in the trial court's letter of May 18, 1998 [*Appendix*, Volume II, p. 63].

On October 27, 1998, the defendant was adjudicated guilty of the charge and sentenced. The court suspended adjudication and all penalties, including license suspension, pending appeal.

Petitioner was granted an appeal to the Court of Appeals of Virginia. On February 29, 2000 a panel of the Court of Appeals affirmed the decisions of the trial court. Petitioner's request for a rehearing *en banc* was denied.

Petitioner petitioned for appeal to the Supreme Court of Virginia which refused his petition on September 7, 2000; Petitioner's request for rehearing and "Motion of Appellant for Remand or for Dismissal" were denied on December 14, 2000.

Petitioner implies in his Statement of the Case that "Defendant's Statement of Facts To Supplement Transcript" was made a part of the record while it was in fact merely filed. Petitioner also implies that orders of the trial court were entered without affording Petitioner an opportunity to object when he was in fact given ten days from entry of the orders to raise objections in writing and failed to make such objections to the orders.

The Petitioner has failed to comply with Rule 5:11 (c) or 5A:8 (c) of the Rules of the Supreme Court of Virginia to make "Petitioner's Statement Of Facts To Supplement Transcript" part of the record. The "Petitioner's Statement Of Facts To Supplement Transcript" was filed December 28, 1998. A copy was mailed or delivered to opposing counsel but was not accompanied by notice that such statement will be presented to the trial judge on any date. The statement is not signed by the trial judge, Rule 5:11 (c) (2) or 5A:8 (c).

As a result of these errors, the Respondent was not afforded an opportunity to object to the statement on the ground that it is erroneous or incomplete.

The Petitioner failed to raise or preserve objections to the majority of the issues addressed by the Petitioner in his brief until after trial and the verdict of the jury. Attempts to correct such failures by a Statement of Facts were unsuccessful inasmuch as it was never presented to the trial judge for entry or signed by the trial judge. The orders of the trial court entered on January 4, 1999, [*Appendix*, p. 21, p. 38, p. 172, p. 174] each contained a paragraph stating:

> "The Clerk of this Court shall certify a copy of this Order to counsel upon entry. The Defendant shall have ten (10) days from the date of entry to file written objections to the form or content of this Order to the extent that the Defendant represents that it does not accurately represent the proceedings of the Court".

The Petitioner never filed any such objections to the orders.

WHY THE PETITION SHOULD BE DENIED

The Petitioner presents no important federal question. There has been no decision in this matter of any federal question by a state court of last resort in conflict with the decision of this Court or of a federal appellate court or of another state court of last resort. There is no indication that a lower court has departed from settled law, or has reached an issue of some national significance.

Petitioner challenges a Virginia drunk driving recidivist statute that, by its plain language and state judicial decisions interpreting said statute, creates enhanced penalties for subsequent offenses of drunk driving when a prior conviction, either within five or ten years of the current offense, is charged as an additional element to drunk driving and proved beyond a reasonable doubt. That this violates the "Petitioner's Fifth, Sixth and Fourteenth Amendment protections" is without basis. This is a well settled issue that has been decided contrary to Petitioner's position.

Petitioner asserts erroneous factual findings at trial. Petitioner asserts that no fair understanding of the prosecution's evidence could be considered to have proved each of the elements of the offense charged beyond a reasonable doubt. This assertion simply is not supported by any rational reading of the record.

Petitioner without any evidence or testimony placed in the record, or even offered to be placed in the record, during any prior judicial proceeding in this matter, and relying only on Petitioner's counsel's assertions in the petition, attempts to raise the issue of juror prejudice against the Petitioner during trial.

Petitioner states no special and important reasons for the grant of a writ of certiorari.

PRINCIPLES OF LAW, ARGUMENT AND AUTHORITIES

Petitioner's question 1:

May evidence of recidivism only be presented as a sentencing factor in a state criminal charge and not as an element of an offense enhancing the penalty of the underlying crime, proved to a jury beyond a reasonable doubt? And, may Petitioner raise the issue on appeal when no objection was made at trial to the admission of the prior convictions in evidence?

The Petitioner was convicted of driving while under the influence of alcohol, third offense within ten years in violation of Front Royal Town Code § 156-8. This Town ordinance incorporated by reference the statutes of the Commonwealth of Virginia criminalizing drunk driving

contained in Article 2 (§§ 18.2-266 through 18.273) of Chapter 7 of Title 18.2 of the Code of Virginia in effect on July 1, 1997, as permitted by Virginia Code § 46.2-1313 ["Ordinances enacted by local authorities pursuant to this chapter may incorporate appropriate provisions of this title, of Article 9 (§ 16.1-278 et seq.) of Chapter 11 of Title 16.1, and of Article 2 (§ 18.2-266 et seq.) of Chapter 7 of Title 18.2 into such ordinances by reference."]

At that time Virginia Code § 18.2-271(C) provided:

> If a person is tried on a process alleging a third or subsequent offense of violating § 18.2-266 or subsection A of § 46.2-341.24 within ten years of two other offenses for which the person was convicted, or found guilty in the case of a juvenile, under § 18.2-266, subsection A of § 46.2-341.24 or any valid county, city or town ordinance or law of any other state or of the United States substantially similar to § 18.2-266 or subsection A of § 46.2-341.24, and is convicted thereof, such person shall not be eligible for participation in a program pursuant to § 18.2-271.1 and shall have his license revoked as provided in subsection B of § 46.2-391. The court trying such case shall order the surrender of the driver's license of the person so convicted, to be disposed of in accordance with § 46.2-398, and shall notify such person that his license has been revoked indefinitely.

This clearly showed the legislative intent that to impose the enhanced penalties for driving while under the influence of alcohol after a prior conviction, the prior conviction must be proved as an element of that offense beyond a reasonable doubt, in other words, "tried on a process alleging a third or subsequent offense of violating

§ 18.2-266." The penalty provision noted by Petitioner, Virginia Code § 18.2-270, uses the language "Any person convicted of a second offense . . . " and "Any person convicted of a third or subsequent offense . . . " which clearly implies that a prior conviction must be charged as an element and proved beyond a reasonable doubt.

The Court of Appeals of Virginia, the highest court in the Commonwealth to consider the issue, in *FARMER v. COMMONWEALTH*, 10 Va. App. 175, 390 S.E.2d 775 (1990), *aff'd on reh'g*, 12 Va. App. 337, 404 S.E.2d 371 (1991) *(en banc)*, the Court upheld introduction of evidence of prior DUI convictions in the guilt phase of a bifurcated trial on charges of DUI as a third or subsequent offense saying: "We hold that evidence of prior DUI convictions does not constitute the 'traffic record' as contemplated by Code § 46.2-943 where the offense charged under Code § 18.2-266 is a subsequent offense of DUI punishable under Code § 18.2-270. We further hold that proof of such charge requires proof of the prior DUI convictions. For these reasons, the trial court did not err in admitting evidence of Farmer's prior DUI convictions independent of his prior traffic record during the guilt stage of the trial." *Id.* at 181.

At trial in the Warren County Circuit Court, the Petitioner did not object to the language of the warrant charging as an element 'After having been convicted or found guilty 2 times previously within the past 10 years of a prior offense as set forth in the last paragraph of 18.2-270", nor to the admission of the evidence of the prior convictions at trial on February 24, 1998 [TR 137;

Appendix, Volume II, p. 316]. An appropriate cautionary instruction was given to the jury regarding the evidence of prior convictions, without objection by the Petitioner [*Appendix*, Volume I, p. 12].

This Court in *SPENCER v. TEXAS*, 385 U.S. 554, 559-560 (1967), upheld the constitutionality of a Texas recidivist statute that required proof of a prior conviction during the guilt/innocence stage of a jury trial. That case remains good law and was reaffirmed in *MARSHALL v. LONBERGER*, 459 U.S. 422, 423 (1983):

> (c) Because respondent's prior conviction was valid, this case is controlled by *Spencer v. Texas*, 385 U.S. 554, which is reaffirmed. The Due Process Clause does not permit the federal courts to engage in a finely tuned review of the wisdom of state evidentiary rules. The jury in respondent's trial was instructed to consider the prior conviction only in determining whether the specification was proved, and it is a "crucial assumption" of the jury trial system that juries will obey their instructions. Moreover, as recognized by the common law, any unfairness resulting from admitting prior convictions generally is balanced by their probative value. Pp. 438-439, n. 6.

Petitioner sites a number of cases in support of his position but they do not stand for the proposition asserted.

The issue in *ALMENDAREZ-TORRES v. UNITED STATES*, 523 U.S. 224, 228-229 (1998), was one of statutory interpretation inasmuch as the Court stated: "We therefore look to the statute before us and ask what Congress

intended. Did it intend the factor that the statute mentions, the prior aggravated felony conviction, to help define a separate crime? Or did it intend the presence of an earlier conviction as a sentencing factor, a factor that a sentencing court might use to increase punishment?"

The issue in *MONGE v. CALIFORNIA*, 524 U.S. 721, 734 (1998) was whether trial like procedural safeguards implemented by a state in sentencing proceedings compelled the extension of the double jeopardy bar.

The issue in *CASTILLO v. UNITED STATES*, 530 U.S. 120, 131 (2000) was also one of statutory interpretation, specifically whether words in a federal criminal statute create offense elements to be determined by a jury or sentencing factors to be determined by a judge.

In *APPRENDI v. NEW JERSEY*, 530 U.S. 466 (2000), the Court said "[t]he question presented [was] whether the Due Process Clause of the Fourteenth Amendment require[d] that a factual determination authorizing an increase in the maximum prison sentence for an offense from 10 to 20 years be made by a jury on the basis of proof beyond a [Slip Op. 2] reasonable doubt". This issue was decided affirmatively.

A similar result was reached in *UNITED STATES v. DAVIS*, 184 F.3d 366, 367 (4th Cir. 1999) where the Court stated: "If a fact is an offense element, it must be charged in the indictment and, if the defendant chooses to proceed to trial, it must be proven beyond a reasonable doubt. If, on the other hand, a fact is a mere sentencing consideration, it need not be raised until sentencing and need be proven only by a preponderance of the evidence."

In *JONES v. UNITED STATES*, 526 U.S. 227 (1999), the Court noted that "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *Id.*, at 243, n. 6. The Fourteenth Amendment commands the same answer in this case involving a state statute.

These cases cited by Petitioner address issues of federal statutory interpretation or situations where due process requires factors enhancing punishment in criminal matters be charged and proved beyond a reasonable doubt. None of those cases stand for the proposition that in a state criminal recidivist statute the fact of a prior conviction cannot be made an element of the offense and be required to be proved beyond a reasonable doubt.

Petitioner's question 2:

Did the evidence presented support the conviction of the offense charged beyond a reasonable doubt?

The trial record shows that the testimony of the prosecution witnesses did not conflict on any material issue. Petitioner has attempted to raise minor conflicts in time, distance, and position of participants that are readily explained by the different perspectives of witnesses and the effect of sudden events. Petitioner asserts that these immaterial conflicts in witness recollection somehow discredit the testimony of the arresting officer as to his uncontradicted testimony regarding his observations of the operation of a motor vehicle. Petitioner asserts that

those minor conflicts on immaterial details mean that the officer could not have observed a pickup truck owned by the petitioner drive off of a public road, into a private parking lot, strike the front steps of a building and come to a stop in the open and unobstructed expanse of a quiet parking lot. Petitioner further asserts that the officer could not say he never lost sight of the vehicle; that no one exited the vehicle; that he immediately approached the truck; that he found the Petitioner behind the wheel of the truck, the sole occupant and in an obviously intoxicated condition that was later confirmed by breath alcohol analysis because of these minor and immaterial inconsistencies.

Petitioner has tried to make a vague and casual statement by the arresting officer to witnesses at the scene as to where he was when Petitioner drove his truck into the steps of the building take on a specific, strained and unintended meaning that he was out of sight of events behind the building. Petitioner's interpretation of the statement is contrary to the arresting officer's explanation under oath as to what he meant and where he in fact was located. That sworn explanation was not contradicted by the observations of any other witnesses. The import of the officer's statement is not what Petitioner would like it to mean but rather what the officer in fact meant and testified to at trial, i.e., that he was around at the corner of the building in a position that allowed him to see all the relevant events.

The arresting officer did not know the defendant, and there is no indication on his part of bias or ill will.

The version of the events offered by witnesses for the prosecution and the defense at trial were diametrically opposed and the jury in evaluating the credibility of the witnesses simply found the testimony of the police officer more credible.

Petitioner's question 3:

May Petitioner raise the issue in this petition of alleged juror prejudice against the Petitioner at trial, without any evidence to support the assertion?

Petitioner has failed to offer or attempt to offer any form of evidence or testimony to support the assertions contained in the petition of juror prejudice in any judicial proceeding in this matter, other than counsel's assertions. Petitioner first made the allegation a year and a half after trial that the juror, David H. Catherman, was a convicted felon at the time he sat as foreman of the jury and that the juror bore ill will toward the Petitioner at the time of trial.

Virginia Code § 8.01-338 disqualifies persons convicted of a felony from serving as jurors. There is nothing to suggest that provision is intended to do other than protect the integrity of the justice system of the Commonwealth of Virginia. Petitioner has never offered a record of conviction certified pursuant to Virginia Code § 8.01-389 arising from the juror's felony arrest in the State of Georgia in 1978. Petitioner has not attempted to make the juror's response on the trial court's jury questionnaire a part of the record.

Petitioner had an opportunity to inquire of the jurors at trial during *voir dire* whether they may have been

convicted felons and did not. If the Petitioner had concerns such an inquiry could have prejudiced the jury against the petitioner, he could have requested the question be asked by the trial court and he did not. Any meaningful inquiry by counsel at trial has the potential to make jurors uncomfortable but that is simply part of the tactical decisions made by trial counsel. There is no indication anywhere in the record that counsel for Petitioner looked at the juror questionnaires before or during trial. A reasonable inference would be that the Petitioner had no interest in any possible felony convictions of jurors until it became a last gasp effort to forestall his sentencing. The mere circumstance of a sitting juror's prior felony conviction does not suggest a circumstance that would probably cause injustice to the defendant in a criminal trial. It is only with the addition of the allegation of ill will and the supposed admission of the juror of consideration of evidence of Petitioner's prior convictions of drunk driving during deliberations, contrary to the trial court's instruction, for a purpose other than proof of the element of prior conviction to support a subsequent offense charge, that the appearance of a significant issue is created.

If the juror in fact bore such ill will toward the Petitioner, it would seem incredible that the Petitioner would not have recognized the juror at trial and even more incredible that if the juror bore such ill will toward the Petitioner that he would confide his alleged felony conviction to his supposed enemy during some apparently amicable conversation. The Petitioner's allegations in the portion of the petition regarding "Juror Irregularities" implies that Petitioner approached the juror at

his home while on bond pending appeal and the juror that bore such exceptional ill will toward Petitioner promptly confessed to him that he was a convicted felon, wanted to cause him harm and had ignored the trial court's instructions during deliberations. Petitioner fails to explain the motive for the jurors' ill will to the Petitioner.

The transcript of the trial proceedings (TR 13-20) show the juror's sworn response to the trial judges' questions during *voir dire*: "Are any of you related to the Defendant, Mr. Pennington, by blood or by marriage, or do you otherwise know the Defendant?", negative response from the juror. "Anybody else who knows Mr. Pennington?", negative response from the juror. In other inquiries by the trial judge as to whether any juror had information about Pennington the juror's response was negative; whether he had an opinion about Pennington's guilt, negative response; was he sensible of any bias or prejudice against Pennington, negative response.

There is nothing in the record for the Court to review in support of the Petitioner's bare allegations in the petition of jury irregularities.

CONCLUSION

The plain error doctrine does not apply where there is no error. Making a prior conviction an element of the offense in a recidivist statute is constitutionally permissible and well settled law. The evidence before the jury supported the finding of guilt. The allegations of jury

irregularities are unsupported by any evidence or testimony and contrary evidence is shown in the record of the jury *voir dire* by the trial court.

Respondent requests the petition for writ of certiorari be denied.

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